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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.....

SAMUEL TUCKER and SAMUEL SCHRADER,
Petitioners,

vs.

MARGARET P. CUTLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONERS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Samuel Tucker, and Samuel Schrader pray that a writ of certiorari issue to review the judgment and order entered October 13, 1950, affirming the judgment and order of the District Court of the United States for the Eastern District of Kentucky, entered on October 6, 1949.

SUMMARY STATEMENT

This case presents an important question of Federal Law and Practice, concerning the jurisdiction of District Court to execute the penal laws of a State, which has not

been, but should be settled by this Court. It involves the interpretation of Title 28, U. S. C. Section 1332, which confers jurisdiction of civil suits upon District Courts of the United States, and the interpretation of a Kentucky Law (372.040 K.R.S.) which authorizes the recovery of treble the amount of gaming losses by a person other than the loser.

This action arises from a Bill of Complaint filed by the Respondent in the Eastern District of Kentucky, seeking to recover from the petitioners a judgment in treble the amount of the alleged gaming losses of her husband to said petitioners, based upon Kentucky Revised Statute 372.040, providing:

> "If the loser or his creditor does not, within six months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, ANY OTHER PERSON may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five years from the delivery or payment."

At or near the time of the filing of Respondent's Bill of Complaint, there were many other suits of a similar nature filed in the same Court, and to which motions to dismiss such Bills of Complaint were filed and overruled by the District Court. Among these cases were the case of *Salonen* v. *Farley*, 82 Fed. Sup. 25, and *Pauline Hartlieb* v. *Edward Carr, et al.*, Civil Action No. 432, not reported. The ruling of the District Court in *Salonen* v. *Farley* (supra) preceded that of the instant case, and formed the basis of the Court's order overruling the Petitioners' motion to dismiss the bill of complaint of the Respondent.

The motion to dismiss the bill of complaint was upon the ground that the District Court had no jurisdiction of

the subject matter of the action because, (1) the Kentucky Statute under which Respondent brought her cause of action is a Statute creating a penalty, and (2) being a penal statute of the Commonwealth of Kentucky, the District Court had no jurisdiction to enforce it, since the courts of one State or sovereignty cannot enforce the penal laws of another state.

The Courts below held that the Kentucky Statute was not penal, but "intended to be remedial and only penal incidentally, or at best described as both penal and remedial", and assumed jurisdiction to enforce the statute as a remedy for a private wrong.

The facts may be simply stated. Margaret P. Cutler, the respondent, and her husband, Joseph Cutler, are residents of the State of Ohio; the petitioners were both residents of the Commonwealth of Kentucky, and the complaint alleges that the husband of the Respondent gambled with, and lost to the respondents various sums of money between April 13, 1947 and June 15, 1948, the total amount of the alleged losses being $32,500.00. The Complaint and Amended Complaint further sets out that neither her husband nor his creditors have sued the Petitioners for the recovery of these alleged losses, upon which Respondent bases her right to recover of them the sum of $97,500.00 (Rec. pp. 1-5). The recovery was limited to the sum of $95,400.00 by direction of the Trial Court, owing to a variance between the pleading and proof (Rec. p. 235).

The defenses of the Petitioners consisted of a general denial, set-off on account of winnings by her husband from the Petitioners, and further plea of collusion between Respondent and her husband for the purpose of re-

covering treble, rather than the actual losses to which her husband would have been limited by law (Rec. pp. 6-7).

The District Court refused to instruct the jury upon the last named defense (Rec. p. 236), and a verdict was returned for the Respondent in the sum of $15,000.00 (Rec. p. 237).

OPINION BELOW

The District Court for the Eastern District of Kentucky filed no opinion. The Court relied upon the former opinion in *Salonen* v. *Farley*, 82 Fed. Sup. 25, (Rec. pp. 14-24) and *Pauline Hartlieb* v. *Edward Carr, et al.*, Civil Action No. 432 (Rec. pp. 11-13), on the docket of that Court, which is not reported. The Sixth Circuit Court of Appeals filed no opinion, but made an order affirming the District Court "for the reasons given by the District Judge" in the cases of *Pauline Hartlieb* v. *Edward Carr, et al.* (supra) and *Salonen* v. *Farley* (supra), which is found at Page 249-250 of the Record, and was entered on October 13, 1950.

JURISDICTION

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240 (a) of the Judicial Code as amended by the Acts of February 13, 1925 (U. S. C., Title 28, Sec. 347).

THE QUESTIONS PRESENTED

The legal questions presented are (1) whether the Kentucky Statute, Kentucky Revised Statutes 372.040, which authorizes the recovery of treble the amount of gaming losses by a person other than the loser, is a statute which imposes a penalty, and therefore a penal statute, which the District Court of the United States has no jurisdiction to enforce; (2) may the District Court, by

construing a State Statute contrary to the construction placed upon it by the highest Court of the State enacting the same, enlarge its jurisdiction beyond the confines of the Congressional enactments limiting such jurisdiction?

REASONS RELIED ON FOR WRIT OF CERTIORARI

The decision of the Court below is without precedent. It decides an important question of Federal Jurisdiction, which has not been, but should be, decided by this Court. The question involves the jurisdiction of the District Court to enforce the penal laws of a "foreign" jurisdiction.

The questions involved are of importance, not only in this case, but in the many cases brought, or to be brought, in the District Courts, which are of a like character. One of the main grounds for the granting of the writ herein is that the Sixth Circuit Court of Appeals has decided an important question of local law in conflict with the applicable decisions of the Court of Appeals of Kentucky, which is without precedent, and of broad general interest throughout Kentucky, and the many other states having similar statutes, which has not been, but should be, decided by this Court.

There is a conflict in the interpretation of U. S. C. Title 28, 1332, by the Sixth Circuit Court of Appeals in the instant case, and that of *Bowles, etc.* v. *Farmers National Bank of Lebanon, Ky.*, 147 (C. C. A. 6th) F. (2d) 125, in which it held the recovery of treble damages for sales of whiskey at prices in excess of ceiling prices, to be a penal action. There is also a conflict between circuits relative to the interpretation of the jurisdiction of District Courts to enforce the penal laws of a foreign jurisdiction, *Stichtenoth* v. *Central Grain & Stock Exchange,* (C. C. A. 7) 99 Fed. 1, which holds directly contra.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court.

2. The Circuit Court of Appeals erred in affirming the ruling of the District Court that the Kentucky Statute under question is remedial, rather than penal, and therefore it had jurisdiction to enforce the same.

3. The Circuit Court of Appeals, and the District Court, erred in construing the Kentucky Statute contrary to the construction placed upon it by the highest Court of Kentucky, and thereby enlarged the jurisdiction of the District Court beyond the confines of the Congressional enactments limiting such jurisdiction.

ARGUMENT

We believe that this is peculiarly a case for the exercise of the power of supervision and review by this Court. It involves a conflict between inferior Courts of a question of jurisdiction of Federal District Courts. This Court alone can settle the question and reconcile the conflict.

The questions are of great general interest and concern. Many states have legislation akin to that under question herein. The exercise of jurisdiction by the Federal Courts of actions to recover gaming losses under State Statutes by third persons, not in privy with either the winner or the loser, has never before been recognized, so far as diligent research discloses. If this jurisdiction is sustained, it will start a flood of litigation into the Federal tribunals of proceedings which have heretofore been recognized as maintainable only in the Courts of the various States.

The judgment of affirmance by the Circuit Court of Appeals is based upon the same reasons and grounds given by the District Court in overruling Petitioners' motion and grounds for a new trial. (R. 249-250). Both Courts adopted the opinion in the case of *Salonen* v. *Farley*, 82 F. Sup. 25, (R. 14-24) and the memorandum of the District Court in the case of Pauline Hartlieb v. Edward Carr, et al., not reported, (R. 11-13), as the basis for sustaining the jurisdiction of the District Court.

We earnestly contend that the construction given this Kentucky Statute is erroneous, and the reasoning of the District Court is not justified by the plain wording of the Kentucky Statute when considered in the light of its historical background, nor is it justified when considered in the light of the interpretation placed upon similar statutes by the Courts of last resort of the several States which have such legislation. Nowhere has diligent research unearthed any opinion which holds this type of statute to be other than penal.

The District Court obviously, in the case of Salonen v. Farley, supra, held the statute to be remedial for two reasons, namely: (a) that the action was brought by the wife of the loser, and, (b) that the recovery of any amount in excess of actual losses is in the nature of punitive damages. Neither position is tenable. Although the action was brought by the wife, her right to do so is not founded upon the marital relationship, nor is anything said in the pleadings about loss of support, and the action could have been brought by any other person in the wide world who first reached the Court House with a petition. This Statute gives the right to recover treble gambling losses TO ANY PERSON, without limit or restriction. In fact, the position of the District Court is

denied in Kentucky by the case of *Moore* v. *Settle,* 82 Ky. 187, where its court of last resort had under consideration this same statute. There a wife of a gaming loser, under the disability of coverture, brought an action contending that this statute, creating a cause of action for ANY OTHER PERSON removed the disability. The Kentucky Court of Appeals, in construing the wording of the Statute, held:

> "The section means, by the words 'any other person', any other person competent to institute the suit. It creates no new cause of action in favor of persons who could not sue. Nor does it relieve any person of disabilities existent at the date of its passage.
>
> "It simply created a new cause of action in favor of such other persons, besides the loser and creditor, as had legal capacity, either in person or by another, to sue".

The second reason is clearly not tenable on the ground that an award of punitive damages can never be made, save as an incident to primary and private injuries sustained by the suitor. The rule is stated in the case of *Great Atlantic and Pacific Tea Co.* v. *Smith,* 281 Ky. 583:

> "Exemplary or punitive damages are generally defined as those given in enhancement of compensatory damages on account of the wanton, malicious or reckless character of the acts complained of, and they go beyond actual damages suffered and are allowed where the tort is aggravated by evil motive, actual malice, or deliberate violence. They are given not by way of a public punishment, but by way of private damages for the wrongful act, as a tort, not a crime. Scott v. Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. Ed. 632; 15 Am. Jur., Damages, Sections 265 and 266, Chiles v. Drake, 59 Ky. 146."
>
> "Their award need bear no relation to the compensatory damages allowed, but only to the injury and its

cause complained of. Louisville & Nashville R. Co. v. Ritchel, 148 Ky. 701."

See also *Louisville & Nashville R. Co.* v. *Bryant*, 200 Ky. 177.

The cases cited by the District Court in support of its interpretation that this is a remedial statute are not analagous.

The lower court seems to have been led astray mainly upon the holding of the case of *Cross* v. *Ryan*, 124 Fed. (2d) 883, which was its main reliance in the Salonen case, supra. We believe, instead, that this case fortifies our position. The act under consideration in that case was the Illinois Dram Shop Act, which specifically gave a cause of action to certain close relatives denominated in the Act, and to no others, which was a cause of action for actual damages sustained by any of them through the injudicious sale of alcoholic beverages to one upon whom one or more of the class were dependent for support. If the Kentucky statute were that type of legislation, and the amount of recovery limited to actual damages,—and the right of recovery was limited to the dependents of the loser, as is the case in the Illinois Dram Shop Act, there would be no question but that the statute would be remedial. But that is not the case. In passing, it might be observed, and the Court well knows that under the common law there was no cause of action for damages for the wrongful death of another. Such causes of action are statutory. The history of the so-called "Death Acts" will show that, at the outset, in many States, the amount of recovery was fixed at Five Thousand Dollars. This was a fixed recovery, and no actual damage was required to be shown. One of the latest cases on this subject is *McLay* v. *Slade*, 48 R. I. 357, 138 Atl. 212 (1927), where

an action was commenced by the representative of a decedent in Rhode Island for a wrongful death which occurred in Massachusetts. In that State, the statute provided for the recovery of a sum of not less than five hundred, nor more than ten thousand dollars, "to be assessed with reference to the degree of his culpability" when death was caused by the wrongful act of another. The Supreme Court of Rhode Island held this statute to be penal, and not enforceable beyond the State of Massachusetts.

> "The purpose of these statutes has remained the same, and the amount of the penalty is based upon exactly the same consideration. Whatever was the nature of the penalty, when recovered upon a criminal proceeding through indictment, remains its nature now when recovered in an action for tort. *This civil form of procedure has been substituted for the criminal for the accomplishment of the same purpose: i.e., for the recovery of a penalty imposed by way of punishment.*"
>
> "*In Hudson* v. *Lynn & B. R. R. Co.*, 185 Mass. 510, 518, 71 N. E. 66, 69, *the court likened the action of tort allowed under the Massachusetts death statutes to the civil action allowed to a common informer for the recovery of a penalty imposed as a punishment, and said that an action under those statutes is of the same kind;* 'the only difference being that the penalty in these actions goes, not to an informer, but to the family of the deceased.' " (Emphasis ours.)

There is a wealth of Federal decisions that those Death Acts were penal and could not be enforced in the Federal Courts. Thereafter many, and as far as we know, all of the States adopted legislation authorizing the recovery of special and provable damages for the wrongful death of another. These acts are generally held to be remediable, and enforceable in the Federal Courts.

This statute has been construed by the Kentucky Court of Appeals to be penal in the cases of *Jacob* v. *Clark,* 115 Ky. 225, and *Estill, etc.,* v. *Fox,* 7 T. B. Monroe, 552. The District Court refused to accept this construction, holding that:

> "While it is true that Federal Courts must follow strictly the State Court decisions, * * * they do not have to accept the language used by the State Courts as actually expressing the true situation."

The Court erred in this position. *Franklin Sugar Refining Co.* v. *William D. Mullin Co.* (D. C. Del.) 7 Fed. (2d) 470; *Northern Pacific Ry. Co.* v. *Meese,* 239 U. S. 614, 36 S. Ct. 233, 60 L. Ed. 467; *Corpus Juris Secundum, Federal Courts, Section 171, pages 1247-1248; Watson* v. *Buck,* (Fla.) 313 U. S. 387, 61 S. Ct. 962, 85 L. Ed. 1416; *United States* v. *State of Texas,* 314 U. S. 480, 62 S. Ct. 350, 86 L. Ed. 356; *Parker* v. *Moore,* 115 Fed. 799, 802; *Madden* v. *Commonwealth of Kentucky,* 309 U. S. 83, 60 S. Ct. 406; *Fleenor* v. *Hammond,* (C. C. A. 6) 116 F. (2d) 892, 985; *Yellow Cab Trans. Co.* v. *Louisville Taxicab & Tr. Co.,* (C. C. A. 6) 147 F. (2d) 407, 412.

Indeed, the most persuasive reason the Kentucky Court of Appeals found in holding the Act to be penal in Jacob v. Clark is quoted as follows:

> "The action here allowed is in the nature of a penalty for a violation of the law; OTHERWISE THE LEGISLATURE WOULD HAVE NO CONSTITUTIONAL POWER TO ENACT THE STATUTE WHICH AUTHORIZES IT."

It has been universally held that the District Courts have only such jurisdiction as is expressly conferred by Congressional enactment. Title 28 U. S. C. Section 1332,

provides that the District Courts shall have original jurisdiction:

> "of all civil suits where the matter in controversy exceeds the sum of three thousand dollars, exclusive of interest and costs, and is between (1) citizens of different states:"

The District Court adopted the view that a more liberal construction of the jurisdictional statute should be given because the Federal Tribunal considering the question was located within the enacting state. The jurisdiction of Federal District Courts cannot be enlarged except by new enactment. It must apply to all District Courts alike, regardless of the place of holding Court. *Noland v. Noland,* (C. C. A. 9) 111 Fed. (2d) 322; *Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 86 L. Ed. 47, 54, 62 S. Ct. 15; *Humphrey* v. *U. S. Fidelity & Guaranty Co.* (D. C. S. C.) 38 Fed. Sup. 224; *Kresberg* v. *International Paper Co.,* (C. C. A. 2) 149 Fed. (2d) 911.

The Kentucky Legislature enacted this Statute as a penal law; the Kentucky Court of Appeals has construed it to be such; and the Congress of the United States has limited the jurisdiction of Federal Courts in the enforcement of penal statutes, to:

> "suits and proceedings for the enforcement of penalties and forfeitures incurred under *any law of the United States.*" 28 U. S. C. Sec. 41 (9).

If Congress had intended the Federal Courts to enforce the penal statutes of the several states, it would have said so. The effect of the judgments and opinions below is to enlarge the jurisdiction of District Courts beyond that to which it is limited by law.

"It is a universally accepted rule of law that penal statutes will not be recognized or enforced in jurisdictions other than those in which they are enacted. The penal laws of one state can have no operation in another state, and furthermore, the state will not give effect to such penal legislation of another state." 23 Am. Jur. p. 646, Sect. 56. This rule is settled in the cases of *Huntington* v. *Attrill,* 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123; *The Antelope,* 10 Wheat. 66, 123; *Stichtenoth* v. *Central Stock & Grain Exchange,* 99 Fed. 1; *Iowa* v. *C. B. & Q. R. Compan,* 37 Fed. 497, 3 LRA 554; *Pacolet Mfg. Company* v. *Weiss,* 194 S. E. 568, and many other cases too numerous to mention.

This rule has been held to apply as between the states and the federal courts. *Indiana* v. *Allegheny Oil Company,* 85 Fed. 870, 873:

> "The penal laws of the several states of the United States are regarded, so far as the jurisdiction of the courts of the United States are concerned, as laws of a foreign country."

Historically, this legislation has been on the Statute books of Kentucky since it became a State, having come to it from the Statutes of Virginia. It has been adopted and re-adopted throughout the years, being changed only in the ultimate beneficiary of the recovery. At various times, such recovery, by "popular action", was payable to the common school fund—the county tax fund—partially to the suitor and partially to some other public use. The Act of 1854, which is Section 4 of Chapter 48, R. H. Stanton's Revised Statutes of Kentucky, Vol. 1, p. 563, provided that the recovery should be "one half for the person suing, and the other half for the Commonwealth". All of these enactments were part of the general laws for

the suppression of gaming, and so appear in the published Statutes until re-titled and separated, not by the Legislature, but by codifiers of the laws. Identical, or at least substantially comparable Statutes have been enacted by many of the States of the Union, and have always been considered judicially by the Courts of such States as creating a penalty. Nowhere, in any of the Statutes is there a provision allowing recovery of more than the actual losses, is there any language which suggests that the enacting authority gave any consideration to providing a remedy to dependents. By the process of logical reasoning, if the instant action had been brought by some person other than the *wife* of the alleged loser, the foundation of the decision is washed away, and the Court could not have held the Statute to be remedial.

The question here is not whether the wife or dependent of a profligate husband has been damaged by his gaming losses. It is "the wholly different one of the jurisdiction of a federal court over the subject matter of a particular action, and effect must be given to the well-established rule that federal jurisdiction is not to be extended beyond the scope permitted by a strict construction of the statute upon which it rests." *Kresburg* v. *International Paper Company*, (2nd cir.) 149 Fed. 2nd. 911. In that case, Judge Chase, writing for the Court, said:

> "If and when Congress desires to have the term "a corporation" in the Judicial Code include an association like the Massachusetts trust in this case, a simple amendment is all that will be required. Meanwhile it is not for us to undertake to enlarge by construction an exception in a statute restricting federal jurisdiction."

CONCLUSION

This Court has not heretofore had the question at bar directly presented, and we respectfully pray that the Petition for a writ of certiorari be granted.

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